(3)

No. 90-761

In The

Supreme Court of the United States

October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,
Debtors,

vs.

CHOPIN ASSOCIATES and
MIAMI CENTER LIMITED PARTNERSHIP,
Petitioners,

vs.

FRED STANTON SMITH, TRUSTEE, THE BANK OF NEW YORK, CITY NATIONAL BANK OF FLORIDA, AS TRUSTEE OF LAND TRUST NO. 5008793, S. HARVEY ZIEGLER, AS ESCROW AGENT FOR THE MIAMI CENTER LIQUIDATING TRUST, et al.,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS, THE BANK OF NEW YORK, CITY NATIONAL BANK, TRUSTEE; AND S. HARVEY ZIEGLER, ESCROW AGENT

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QUESTION PRESENTED

Does this Court lack jurisdiction?

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INTRODUCTION

Counsel for The Bank of New York (the "Bank"), one of the Respondents here, had just responded to the

Petitioners' most recent petition[1] when the Bank received this, their seventh frivolous petition for writ of certiorari. The Petitioners have also previously filed a petition for writ of mandamus. With the exception of Case No. 90-676 which is still pending, this Court has denied all of these petitions.[2] The decisions below arose out of five related bankruptcies that commenced in 1984.

Moreover, the Petitioners came to this Court after presenting the same frivolous arguments over the past six years to:

Two different bankruptcy judges;

Ten different district court judges in over thirty separate appeals; and

Eight judges of the United States Court of Appeals in over twenty separate appeals and in a petition for prohibition and mandamus.

STATEMENT OF THE CASE

The five affiliated debtors – Theodore B. Gould ("Gould"), Miami Center Limited Partnership ("MCLP"), Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin") – all filed voluntary petitions in bankruptcy on August 22,

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[1] Case No. 90-676.

[2] Case Nos. 89-917, 89-864, 89-708, 88-80, 87-1989 and 87-1988. References to the Petitioner's Appendix will be denoted as "___a".

1984.[3] The bankruptcy cases initially were consolidated for joint administrative purposes, and the five debtor estates were later substantively consolidated by Order dated July 23, 1985.[4] Gould owned 100% of the stock of co-debtor Holywell, and also served as president and sole director of Holywell. In turn, Holywell owned 100% of the stock of co-debtor MCC, and Gould served as president and sole director of MCC. Gould and MCC were the sole general partners of debtor Chopin and of debtor MCLP. All five debtors were involved in developing the Miami Center Project, an office building and hotel complex in downtown Miami ("Project").

The Bank[5] was the lead construction lender for the Project. Commencing in March of 1980, the Bank

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[3] For purposes of this response, the Petitioners will also be referred to as the "debtors."

[4] Under the bankruptcy and equitable doctrine of "substantive consolidation," the assets and liabilities of related debtors are pooled, and inter-debtor obligations are eliminated.

[5] Pursuant to Supreme Court Rule 29.1, the following is a listing of the relationships of The Bank of New York:

(a) Parent of the Bank – The Bank of New York Company, Inc.

(b) "Affiliates" of The Bank are:

BNY Holdings (Delaware) Corporation
The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.C.
Affinity Group Marketing, Inc.
ARCS Mortgage Corp. (Fla.)
ARCS Mortgage, Inc. (Calif.)
BNY Leasing, Inc.

(Continued on following page)

advanced to the debtors in excess of $196 million under the terms of a series of notes, mortgages and other loan documents. The Bank obtained a final judgment establishing the amount of its mortgage lien at over $234 million as of March, 1985. The Bank proposed a plan of reorganization (the "Plan") that all classes of unaffiliated creditors overwhelmingly accepted but the debtors opposed. On August 12, 1985, the bankruptcy court appointed appellee, Fred Stanton Smith to serve as the Liquidating Trustee as provided under the confirmed Plan.

The debtors failed to obtain a stay pending review of the confirmation order. Thus, on October 10, 1985, the Liquidating Trustee began implementing the Plan in accordance with its terms.

Under the Plan, the Bank's designee (the "Purchaser"), a partnership comprised of affiliates of the Bank

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Eastern Trust Company
The Bank of New York Life Insurance Co., Inc.
Capital Trust Company
BNY Financial Corporation
BNY Personal Brokerage, Inc.
Beacon Capital Management
The Bank of New York Trust Company, Inc.
The Bank of New York Trust Company of California
The Bank of New York Trust Company of Florida, N.A.
Leonard Newman Agency, L.P.

City National Bank was joined below solely in its capacity as the trustee of a land trust. It is not affiliated with the Bank.

and the participating lenders, bought the Project for its MAI-appraised value of $255.6 million. The Bank paid that amount by paying approximately $13 million in new cash over and above the judgment lien on the mortgages held by the Bank (that lien, with interest, was over $242 million by October, 1985). In addition, the Bank released approximately $30 million of cash collateral (which was used to pay hundreds of creditors pursuant to the Plan). All of the debtors' property became property of the Liquidating Trust, which then sold the Project to the Purchaser in accordance with the terms of the Plan.

The district court affirmed the confirmation order,[6] and the United States Court of Appeals for the Eleventh Circuit dismissed the debtors' further appeal as moot, finding that "the plan had been substantially consummated and that . . . it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation."[7]

During the course of the bankruptcies, the debtors were contesting in state court in Dade County the Dade County property tax assessments on the Project for 1979-84. As of the date of the sale to the Purchaser, there were a number of pending *ad valorem* tax lawsuits originally filed by the debtors and subsequently pursued by the Liquidating Trustee following confirmation of the Plan. Because the Liquidating Trust acquired all property

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[6] *Holywell Corp. v. The Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *aff'g, In re Holywell Corp.*, 49 Bankr. 694 (Bankr. S.D. Fla. 1985).

[7] *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

interests of the debtors, the Liquidating Trust also acquired those lawsuits.[8]

The Plan and the closing documents at the sale of the Miami Center to the Bank's nominee required the Liquidating Trustee to escrow a portion of the purchase price sufficient to pay the disputed *ad valorem* taxes. The escrow was established with the Liquidating Trustee's then counsel, Holland & Knight, and negotiations with Dade County for settlement continued. Thereafter, Holland & Knight withdrew as the Liquidating Trustee's counsel, and the bankruptcy court named appellee, Herbert Stettin (the Liquidating Trustee's present attorney), and appellee, S. Harvey Ziegler (one of the Bank's attorneys), as substitute escrow agents of the fund previously held by Holland & Knight.[9]

On March 1, 1988, several weeks before the Liquidating Trustee initially sought approval of the tax settlement, the debtors filed an adversary complaint in the bankruptcy court, Case No. 88-0117-BKC-SMW-A, in which, they sought by declaratory decree the same relief sought in their objections to the tax settlement: to have the tax claims of Dade County stricken based on Dade

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[8] Exhibit "C" to the Plan listed all the litigation involving the debtors, including the *ad valorem* tax lawsuits, which became a part of the Liquidating Trust pursuant to the Plan.

[9] The district court's order also determined that the funds held in escrow were specifically set aside to pay the *ad valorem* property taxes on the Project. The debtors appealed this order to the district court, which dismissed the appeal. Case No. 88-0682-CIV-LCN. The Eleventh Circuit affirmed the dismissal of the debtors' appeal. Case No. 89-5165. The Petitioners did not seek review of that decision by this Court.

County's alleged failure to file proofs of claim in the Chapter 11 proceedings. Prior to filing this adversary proceeding, the Petitioners had actively participated in settlement negotiations with Dade County concerning payment of the *ad valorem* property taxes. By order dated November 18, 1988, the bankruptcy court dismissed this adversary complaint as a result of the Liquidating Trustee's approved settlement of the tax claims with Dade County. 82a.

The bankruptcy court heard testimony from several witnesses on April 28, 1988 on the Liquidating Trustee's motion to approve a settlement with Dade County of the *ad valorem* lawsuits.[10] John Fletcher, an attorney specializing in *ad valorem* taxation matters, testified as to the difficult burden of proof facing the debtors/taxpayers in the *ad valorem* lawsuits. 74a. He further testified that the actual sale of the Project for $255.6 million, which was the same amount as the MAI appraisal, constituted a substantial factor in determining the assessment.

The bankruptcy court further heard from A. H. Blake, a former tax assessor for Dade County and an expert in *ad valorem* matters, who testified that the settlement was fair, reasonable and in the best interests of the Liquidating Trust. 74a. The Liquidating Trustee, who is himself an

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[10] At a subsequent hearing on October 31, 1988 on the Liquidating Trustee's motion for approval of the amended tax settlement (amended to delete a requirement of the trust to pay post-petition interest), the Liquidating Trustee requested the bankruptcy court to take judicial notice of all of the testimony, exhibits and arguments presented at the April 28th hearing. No party objected, and the bankruptcy court granted the motion. 73-74a.

experienced businessman and real estate broker, testified that the settlement was in the best interest of the Liquidating Trust because it would: (a) terminate the multiple pending *ad valorem* lawsuits; (b) prevent exposure of the Liquidating Trust to an adverse judgment in favor of Dade County; and (c) preserve the debtors' claim that the failure to file a proof of claim bars Dade County's *ad valorem* claims. 74-75a.

The bankruptcy court also heard testimony from Gould regarding the interest Gould was asserting as to St. Joe Paper Company. St. Joe Paper Company was the prior owner from whom Gould purchased the unimproved property in 1979. Gould conceded that he could not produce any written agreement concerning a continuing ownership interest of St. Joe Paper Company to a tax refund for overpayment of 1979 *ad valorem* property taxes. 75-76a.

Further, the bankruptcy court heard evidence as to the terms of the amended settlement. The amended settlement compromised outstanding *ad valorem* taxes against the Project running from 1979 through 1985. Under the settlement, the Liquidating Trust would pay Dade County $3,430,754.34 in *ad valorem* taxes for the period running from 1979 through 1984, as opposed to the amounts at risk in the lawsuits (in excess of $11 million). The Bank also agreed to return to the Liquidating Trust a reprorated sum assessed against the Liquidating Trust as part of the October 10, 1985 sale of the Project. The bankruptcy court noted that this reproration would result in the Liquidating Trust receiving approximately $400-500,000.00. 78a.

After having heard considerable testimony and receiving into evidence a substantial amount of deposition testimony, exhibits and other documents, the bankruptcy court entered its order on November 18, 1988, finding that the "terms of the amended settlement are reasonable and in the best interest of the liquidating trust." 82a. The district court affirmed noting: "The bankruptcy court conducted a searching *Jackson*[11] inquiry, and it approved the proposal only after the proceedings yielded a welter of evidence bearing on the propriety of settlement." 38a.

The Petitioners appealed this order affirming the bankruptcy court's order to the Eleventh Circuit. The Eleventh Circuit affirmed in a one-sentence, per curiam opinion, holding that the bankruptcy court had the authority to consider the settlement and did not abuse its discretion in approving the settlement. 33a. The Petition to this Court followed.

ARGUMENTS AGAINST GRANTING THE WRIT

Through the commencement over the past four years of over 60 appeals from bankruptcy and district court orders and seven petitions for review by this Court, the Petitioners have ignored prior rulings and have attempted to systematically dismantle the confirmed and substantially consummated Plan. This Court and the courts below have uniformly denied these frivolous attempts.

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[11] *In re Jackson Brewing Co.*, 624 F.2d 605 (5th Cir. 1980)

These Petitioners, having exhausted their direct attacks on the Plan, have now sought to collaterally attack the Plan and the Liquidating Trustee's implementation of the Plan. This Court should not tolerate this blatant attempt to circumvent the bankruptcy and district court's orders.

The bankruptcy court's factual findings as to the propriety of the settlement were subject to the "clearly erroneous" standard as given "strict application." Bankr. R. 8013; Fed. R. Civ. P. 52; *Birmingham Trust Nat'l Bank v. Case*, 755 F.2d 1474, 1476 (11th Cir. 1985); *In re Garfinkle*, 672 F.2d 1340, 1344 (11th Cir. 1982). The Eleventh Circuit did not err. This Court does not grant certiorari to review evidence. *Rogers v. Lodge*, 458 U.S. 613, 624 (1982).

LACK OF JURISDICTION

A. *The Petition Is Moot*

The debtors are again seeking the return of something the Bank specifically bargained for in the Plan. This Court, however, previously denied the debtors' petition for writ of certiorari from the Eleventh Circuit's opinion that the debtors' appeals are moot. *Miami Center Ltd. Partnership v. Bank of New York*, 488 U.S. 823 (1988).[12]

[12] This Court has consistently denied certiorari jurisdiction where the court below held that the action, in whole or in part, was moot. *See, e.g., United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n*, 871 F.2d 401 (3d Cir.), *cert. denied*, 110 S. Ct. 363 (1989); *Cotton v.*

(Continued on following page)

The debtors' jurisdictional argument (Petition, pp. 22-27) and their rambling assault on several of the principal features of the Plan (Petition, pp. 16-21) are just another frivolous attack on the confirmed, and substantially consummated Plan. The Plan provides that the Purchaser would acquire the Project free and clear of any tax liens. The Plan also gives the Liquidating Trustee the authority to settle, compromise or release any disputes, litigations or controversies in favor of or against the Liquidating Trust or the debtors. The Liquidating Trust includes the *ad valorem* lawsuits. Further, the Plan provides the bankruptcy court with post-confirmation jurisdiction to enter any order necessary or appropriate in order to carry out the terms of the Plan. Thus, the Plan clearly gives the bankruptcy court jurisdiction to approve a settlement of tax liens against the Project.

The debtors' failure to obtain a stay pending their appeal of the bankruptcy court's order confirming the Plan renders their appeal on jurisdictional grounds moot, because the Plan has been substantially consummated.

This Court and the federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders an appeal moot after a plan has

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Mansour, 863 F.2d 1241 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 835 (1990); *Folkstone Maritime, Ltd. v. CSX Corp.*, 866 F.2d 955 (7th Cir.), *cert. denied*, 110 S. Ct. 60 (1989); *Tyler v. Black*, 865 F.2d 181 (8th Cir.), *cert. denied*, 109 S. Ct. 1760 (1989); *Spears v. Thigpen*, 846 F.2d 1327 (11th Cir. 1988), *cert. denied*, 488 U.S. 1046 (1989); *SunTek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 848 F.2d 179 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

been substantially consummated. *Miami Center Limited Partnership v. The Bank of New York*, 901 F. 2d 931 (11th Cir. 1990); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981). "In this situation the mootness doctrine promotes an important policy of bankruptcy law – that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Moreover, the implementation of a confirmed plan irrevocably changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

B. *The Debtors Have Failed To Establish An Appropriate Basis For This Court's Certiorari Jurisdiction*

The debtors argue that this Court has jurisdiction by virtue of the existence of a conflict between the Eleventh and several of the other courts of appeal as to the appropriate standard for determining the propriety of a settlement. Petition, pp. 9-16. Notwithstanding the debtors' imaginative attempts to contrive a basis for this Court's jurisdiction, it is apparent that there is no conflict or important question of federal law to be resolved by this Court. Sup. Ct. R. 10.1.

The Petitioners argue that a conflict exists between the opinion rendered below and the decisions in *In re AWECO, Inc.*, 725 F.2d 293 (5th Cir.), *cert. denied*, 469 U.S.

880 (1984), *In re American Reserve Corp.*, 841 F.2d 159 (7th Cir. 1987) and *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). Even from a very cursory review of these decisions, the Petitioners' arguments and the Opinion rendered below, it is readily apparent that a conflict does not exist. On the contrary, the frivolousness of Petitioners' contention is apparent from their own recognition that the district court relied upon and cited with approval each of these cases. Petition, p. 9; 37a.

In substance, the Petitioners are not arguing that a conflict exists as to the applicable standard, but rather that the lower courts did not correctly apply the "abuse of discretion" and "fair and equitable" standards to the facts in this case. The Petitioners have termed this a "conflict" because this Court does not grant certiorari to review evidentiary matters (particularly where two courts below have concurred in the findings of fact). *Rogers v. Lodge*, 458 U. S. 613, 624 (1982).

For example, the Petitioners argue for the first time (Petition, pp. 11-12) that the bankruptcy court did not make certain factual findings as to priorities and that the district court concluded that these factual findings were not necessary. This argument, of course, has nothing to do with the threshold question of whether a conflict exists. This argument also ignores the clear provisions of the Plan which provide that the Purchaser would acquire the Project free and clear of any tax liens.

The Petitioners also ignore the bankruptcy court's express consideration as to "the potential devastating effect an adverse ruling [in the *ad valorem* tax cases]

would have upon the liquidating trust and its ability to pay claims to creditors and return the surplus to the debtors." 81a. This consideration obviously took into account an assessment of the relative priorities of the creditors and a valuation of the estate. The bankruptcy court also made numerous findings as to the benefits and cost savings that would inure to the benefit of the Liquidating Trust as a result of the settlement. 77-79a. This too contemplates an assessment of relative priorities and a valuation of the estate.

The debtors also argue that the Plan does not provide for the payment of federal income taxes and that this failure "precludes the conclusion that the confirmed plan was fair and equitable to the United States." Petition, p. 16.[13] The debtors have no standing to make this argument on behalf of the United States. These debtors can only allege injury to their own legal rights, and lack standing to assert claims for others. *Diamond v. Charles*, 476 U. S. 54, 61-72 (1986); *Allen v. Wright*, 468 U. S. 737, 750-52 (1984); *R. T. Vanderbilt Co. v. Occupational Safety & Health Review Comm'n*, 708 F.2d 570, 574 (11th Cir. 1983). Further, any argument regarding the tax provisions of the plan is an impermissible attack on the confirmed and substantially consummated Plan.

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[13] Petitioners also attempt to bolster their argument by making numerous references to yet another case pending in the Eleventh Circuit and no doubt soon to headed to this Court. *See* Petition, pp. 13, 17 (arguing the merits of *In re Holywell Corp.*, Case No. 89-5862; App. 13). The Eleventh Circuit and the district court have ruled against the Petitioners on this point.

C. *The Petitioners Other Arguments Are Meritless*

The Petitioners advance a hodgepodge of other arguments to support their contention that the lower courts erred. None of these arguments, however, provide this Court with a basis for jurisdiction.

Moreover, in raising their various challenges to the lower courts' findings and conclusions, the Petitioners have lost sight of the scope of the bankruptcy court's review of the amended settlement proposal. The bankruptcy court was not required to conduct a "mini-trial" as to each of the *ad valorem* lawsuits in order to determine whether the debtors might ultimately prevail. Rather, it was within the bankruptcy court's sound discretion to evaluate:

> (1) The probability of success in the litigation, with due consideration for the uncertainty in fact and law,
>
> (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and
>
> (3) all other factors bearing on the wisdom of the compromise.

In re Jackson Brewing Co., 624 F.2d 605, 607 (5th Cir. 1980); *Protective Comm. for Indep. Stockholders of TMT Trailer v. Anderson*, 390 U.S. 414, 424-25 (1968).

The bankruptcy court scrutinized the merits of the settlement proposal first at a two-day evidentiary hearing in April of 1988. There was ample evidentiary support for the settlement proposal, but the bankruptcy court withheld approval until the parties agreed to strike from the proposal a provision that required post-petition interest

to be assessed against the Liquidating Trust. The parties did, in fact, delete this provision, and the bankruptcy court, after another hearing, approved the amended settlement proposal. 36-37a.

The district court, in affirming, noted: "The bankruptcy court conducted a searching *Jackson* inquiry, and it approved the proposal only after the proceedings yielded a welter of evidence bearing on the propriety of settlement." 38a. The bankruptcy court "recognized the complexity of all of the issues involved, the length of time required to resolve all of these issues, the expense involved in resolving all of these issues, the uncertainty of result, the potential devastating effect an adverse ruling would have upon the liquidating trust and its ability to pay claims to creditors and return surplus to debtors." 81a. The bankruptcy court further found that the settlement agreement was an "exercise of business judgment which appears . . . to be sound, reasonable and practical. It recognizes a large savings in tax to the liquidating trust; it permits the debtor, by appeal only, to continue to invalidate the tax claims in their entirety . . . ; and it assists in the orderly completion of work to be done in ending this case." 81a.

In this instance, the scope of review is very narrow; it is limited to determining whether the settlement approved by the bankruptcy court is "fair, equitable, and in the best interest of the estate." *Jackson*, 624 F.2d at 608. If there is a "substantial factual basis for the approval of a compromise" and the bankruptcy court set out "articulate findings and conclusions," the reviewing court must affirm unless there is some other abuse of discretion by

the bankruptcy court. *Id.; Florida Trailer & Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960).

1. The Law Is Uncertain As To The Duty Of A Non-Consensual Lienholder To File A Proof Of Claim

The law as to the obligation of a non-consensual lienholder to file a proof of claim is inconsistent nationwide, and the Eleventh Circuit has not yet decided this issue. The debtors erroneously argue (Petition, p. 20) that this is not a novel issue and that the Eleventh Circuit has decided this issue. In support of this position, they cite two cases: *In re Internat'l Horizons, Inc.*, 751 F.2d 1213 (11th Cir. 1985) and *In re South Atlantic Financial Corp.*, 767 F.2d 814 (11th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986).[14] These cases, however, are readily distinguishable and thus do not alleviate the uncertainty as to the result concerning this issue.

Unlike this case, *International Horizons* did not involve an *ad valorem* tax claim of a non-consensual lienholder. Further, *South Atlantic* did not even involve a lienholder, non-consensual or otherwise. Moreover, it is doubtful whether either of these cases are applicable in light of the county's argument in district court Case No. 86-2608-CIV-Kehoe, that it had an informal proof of claim. *See, e.g. South Atlantic*, 767 F.2d at 819 (amendment of informal claims).

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[14] The Petitioners improperly cited this case as being reported at "814 F.2d."

On the other hand, a number of cases have held that a non-consensual lienholder does not have to file a proof of claim.[15] Further, Section 506(d) of the bankruptcy code provides that a lien will not be avoided solely because a proof of claim has not been filed. 3 *Collier on Bankruptcy* ¶ 506.07 at 506-69 to 506-70 (15th Ed. 1990).

This issue is further clouded by the fact that the debtors never established that Dade County actually received notice of the filing of the Chapter 11 petitions. Absent such proof, the debtors cannot now fairly object to a failure to file a proof of claim. *See In re Pack*, 105 Bankr. 703, 705-06 (Bankr. M.D. Fla. 1989).

Because of this uncertainty, the bankruptcy court did not abuse its discretion in approving the amended settlement. The risk that ultimately this issue would be decided in favor of Dade County and the potentially devastating affect that such a ruling would have on the Liquidating Trust was a factor the bankruptcy court analyzed; the bankruptcy court determined within its sound discretion that such a risk was not in the best interest of the Liquidating Trust in light of the terms of the amended settlement.

Even assuming that Dade County's failure to file a proof of claim impairs its lien claim in the bankruptcy

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[15] *See, e.g., In re G.S. Omni Corp.*, 835 F.2d 1317, 1318-19 (10th Cir. 1987); *In re Simmons*, 765 F.2d 547, 551 (5th Cir. 1985); *In re Stamford Color Photo, Inc.*, 105 Bankr. 204, 206-07 (Bankr. Conn. 1989); *In re Herbert Sys., Inc.*, 61 Bankr. 44, 46 (Bankr. W.D. La. 1986); *In re Atoka Agricultural Sys., Inc.*, 39 Bankr. 474, 476-77 (Bankr. Va. 1984); *Kinder v. Superior Court of Los Angeles County*, 125 Cal. App. 3d 308, 315, 178 Cal. Rptr. 57, 61 (1981).

court, Dade County's secured lien claim for *ad valorem* taxes would still survive the debtors discharge in bankruptcy. *In re Folendore*, 862 F.2d 1537, 1538-89 (11th Cir. 1989). Because the Plan provides that the Liquidating Trust shall deliver the Project to the Purchaser free and clear of any tax liens, the Liquidating Trust would still have a potential liability to the Purchaser as a result of any lien claim subsequently pursued by Dade County.

Given the uncertainty and length of litigation, the considerable expense associated with pursuing this issue, and the potentially devastating results to the Liquidating Trust if Dade County prevailed, the bankruptcy court certainly did not abuse its discretion in approving the settlement agreement. The bankruptcy court considered Dade County's failure to file a proof of claim and evaluated whether the compromise fell below the "lowest point in the range of reasonableness." *In re Teltronic Servs., Inc.*, 762 F.2d 185, 189 (2d Cir. 1985); *see In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir.), *cert. denied*, 464 U.S. 822 (1983); *In re Arrow Air, Inc.*, 85 Bankr. 886, 890-92 (Bankr. S.D. Fla. 1988).

The debtors failed to prove that the bankruptcy court did not meet the standard imposed by the court in *Jackson*. Because the law on the issue of a non-consensual lienholder's duty to file a proof of claim is unclear, and because a reasonable, rational basis in the record supports the business judgment of the Liquidating Trustee, the bankruptcy court did not abuse its discretion in approving the amended settlement. The tax settlement preserved the debtors' right to pursue the issue of Dade County's failure to file a proof of claim. The Liquidating Trustee, however, chose not to pursue the issue because,

in his business judgment, the risk and expense were too great and the settlement terms were fair. The bankruptcy court also considered this aspect of the Liquidating Trustee's decision, and approved the settlement as within the Liquidating Trustee's business judgment. The debtors have failed to prove that the compromise fell below the "lowest point in the range of unreasonableness" or that the bankruptcy court abused its discretion.

2. The County's Tax Claims Were Constitutional

The Petitioners suggest that there may also be a constitutional issue for this Court's review. Petition, pp. 25-27. Again, Petitioners are grasping at straws in an attempt to provide this Court with some basis for jurisdiction.

The Petitioners ridiculously argue that "the assessed valuations on the Miami Center were discriminatory, subjecting the taxpayer to taxes not imposed on comparable property . . . ." Petition, p. 25. The proof below, however, established no such practices. The Petitioners did not produce any evidence to support this contention. All of the percentage increases and "per-room" valuation differences can be attributed to other facts (quality of construction, location, amenities, occupancy and physical depreciation).

3. The *Ad Valorem* Lawsuits Were An Asset/Liability Of The Liquidating Trust

Throughout their Petition, the Petitioners attempt to create the misimpression that they and not the

Liquidating Trust owned and controlled the ad valorem lawsuits. *See, e.g.* Petition, p. 24. The Plan, however, vested all of the debtors' assets, as defined by Section 541(a) of the bankruptcy code, in the trust, and specifically included the *ad valorem* tax cases. Article V of the Plan also gives the Liquidating Trustee the power and authority to "[s]ettle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them . . . ." Because as noted above the Plan has been confirmed and substantially consummated, any challenge by the debtors to the Plan's provisions is now moot.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petitioners' frivolous petition for certiorari review.

Respectfully submitted,

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By _____
VANCE E. SALTER

By _____
MICHAEL J. HIGER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of December, 1990, a true and correct copy of the foregoing was mailed by first class, postage paid, U.S. mail to:

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